



## 2016 New Year's Resolution: Sign a Manager's Agreement!!

by Dale Alberstone, Esq.

**H**ello everybody. Most everyone hopes that 2016 will bring about world peace, a strong economy, a good presidential election and other important things like that.

As the legal writer for the Apartment Owners Association, my wish and 2016 New Year's Resolution for AOA members is more modest, but nonetheless extremely important for owners and management companies of apartment buildings throughout California.

In fact, it is the same Resolution I have proposed to members for the past 15 years or so: ***Prepare and sign a written employment agreement with each***

***of your resident managers.***

Failure to comply with

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***Failure to comply with statewide wage and hour laws can be financially devastating as it has become commonplace for lawyers representing resident managers to sue for, or at least threaten, damages ranging from \$150,000.00 to \$250,000.00 for unpaid wages, penalties and other related amounts.***

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statewide wage and hour laws can be financially devastating

as it has become commonplace for lawyers representing resident managers to sue for, or at least threaten, damages ranging from \$150,000.00 to \$250,000.00 for unpaid wages, penalties and other related amounts even though the manager was only employed for as little as 1 to 4 years.

In light of claims such as those, not to mention employment grievances managers often file with the California State Labor Commissioner, it is important that AOA members understand the applicable labor regulations and sign written agreements consistent with the law so as to avoid liability.

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## Overview of the Law

On January 1, 2016, the California minimum wage increased statewide from \$9.00 to \$10.00 per hour. Certain cities in California, such as San Francisco and San Jose, already have an even higher minimum wages.

The minimum wage for resident managers who reside in apartment buildings in the City of Los Angeles increases from \$10.00 per hour to \$10.50 per hour on July 1, 2016 if the employer employs 26 or more employees. If the employer employs less than 26, then the \$10.50 minimum wage increase for Los Angeles is deferred until July 1, 2017. (If

a city has a wage requirement higher than California's minimum wage, employers must comply with the city's more stringent ordinance.)

Also, throughout 2016, the maximum allowable rental offset from wages owed in exchange for reduced or free rent is \$564.81 per month for a single manager, and \$835.49 per month where a couple is employed.

Further, the maximum rent in 2016 which can be charged to a manager whose residence in the apartment complex is required as a condition of employment is \$564.81 per month for a single manager and \$835.49 per month for a

couple.

Also bear in mind: **A resident manager is an employee, not an independent contractor, of the owner or management company who hired him.**

## The IWC

The California Industrial Welfare Commission (IWC), as well as the State Legislature, promulgate wage and hour laws for resident managers. The IWC authorizes substantial sanctions against an owner who does not pay the manager the proper minimum wage. Of those, **one of the most oppressive penalties is**

*(continued on page 20)*

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that if the owner or management company does not obtain the manager's signature on a properly drafted agreement, the reduced or free rent the owner or management company gave the manager may not be credited (i.e., offset) against the wages the manager otherwise earned during the Statute of Limitations periods of the preceding three or four years. Thus, the employer will then have to write a check to the manager for what may amount to tens of thousands of dollars for back wages, plus penalties. No insurance will cover that obligation.

### The General Rules

Here are the two general rules for 2016:

#### **Rule No. 1: Payment of Minimum Wage:**

Virtually all resident managers are governed by so-called minimum wage and hour laws which require that they be paid at least \$10.00 per hour for each hour worked. Managers who work more than 40 hours per week, 8 hours per day, or more than 6 consecutive days, are entitled to receive "time and one-half" at \$15.00 for each excess hour. Double time payment may also be required in some circumstances.

**Rule No. 2: Maximum Rent that May Be Charged:** If one or more managers are required to live at the property as a condition of employment, their rent may not exceed \$564.81 or 835.49 per month, depending whether one or two managers are hired.

Much of the remainder of this article will explain the exceptions and qualifications to the two General Rules. **However, bear in mind that the exceptions and qualifications will not apply unless a properly drafted employment agreement is signed by both the manager and the owner or the owner's management company.**

### Exception to Having to Pay Minimum Wage:

There is an exception to the general rule that a



manager must actually be paid wages for the hours he or she works. The exception involves a reduction in the compensation owed in exchange for the owner or other employer providing free or reduced rent for the manager's living quarters.

An owner may reduce the monthly wages owed by the lesser of (1) two thirds the ordinary rental value of the unit, or (2) \$564.81 per month if one manager is employed, or \$835.49 per month if a couple is employed, such as a husband and wife management team.

Stated in a slightly different manner, an owner may not offset more than \$564.81 per month or 835.49 per month,

respectively, from the manager's minimum wages even though the rental reduction of the apartment unit might be substantially more.

For example, if the rental value for the unit is \$1,800 per month (but the manager is not charged any rent), and the manager works 60 hours each month, he is entitled to receive \$35.19 a month from the employer. This is computed as follows: 60 hours at \$10.00 per hour = \$600, which is the minimum wage due. A rent reduction of \$564.81 is proper as the lesser of \$564.81 and two-thirds the ordinary rental value of the unit (which would be \$1,200). Deducting \$564.81

from \$600 leaves a balance due of \$35.19 per month.

The law is similar where a couple is employed to manage the building. In that case, the maximum wage offset is the lesser of \$835.49 per month and two-thirds the rental value of the unit. Thus, if the ordinary rental value of the unit is \$1,800 per month (but no rent is paid) and the husband and wife managers collectively work 60 hours a month, the employer need not pay the couple any wages. This is determined as follows: 60 hours at \$10.00 per hour = \$600, which is the minimum wage due. A wage reduction therefrom of up to

(continued on page 22)

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\$835.49 is proper as the lesser of \$835.49 and two-thirds the value of the unit.

**Bear in mind that the above Minimum Wage Offset Exception does not apply unless a legally sound agreement is voluntarily signed by the manager.**

### Compensation for "On-call" Hours, Waiting Time and Stand-by Time

After being terminated, disgruntled managers sometimes seek compensation from their former employer under a contention that since they were available 24 hours a day on an "On-Call" basis, they should

receive compensation for all of that time, even though they were not actually performing services throughout the period.

Recently, the California Court of Appeal disposed of that argument in *Isner v. Falkenberg* by holding that the owner or management company need only pay the manager for the "time spent carrying out assigned duties." Thus, hours spent sleeping, cooking, eating, talking with friends on the telephone, watching television, playing computer games and engaging in other personal activities are not compensable even though the manager may be "waiting" for a repairman to arrive or sitting around all day

during an "open house" to exhibit a vacant unit to prospective tenants.

Accordingly, an owner or management company does not need to pay a resident manager who is required to live on site for "on call," "stand by" or "waiting" time if the Manager is not actively working. However, the time the manager spends, for example, overseeing the repairman or actually showing a vacancy to potential applicants is compensable because the manager is actually working.

### Maximum Rent Qualifications-16 Units or More

If an apartment building



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consists of 16 rental units or more, the owner is required to have a "responsible person" residing on the premises who has "charge of the apartment house." Usually that person is a manager, but he or she could also be a caretaker or janitor. Regardless of the title given, he or she benefits from the same wage, hour and rent laws applicable to a manager. (For purposes of this article, I refer to all such "responsible persons" as "managers.")

The maximum rent that an owner may charge a required resident manager for his apartment in a 16 or more unit building is limited by law. No matter how much of the mini-

mum wage the owner pays the manager of such a building (even if the owner pays the full minimum wage or even more), the owner may not charge the manager(s) more than \$564.81 or \$835.49 per month, respectively, for the manager's unit. (It is my opinion that there is a legal, but highly technical way to avoid those monetary limitations on a 16 or more unit building. While I am not comfortable publishing them, I am willing to discuss them privately with AOA members, management companies and attorneys.)

The reason for the rental restrictions is that the IWC has decided that if a man-

ager is required to live at the premises, he or she has given up some personal freedom. In exchange for this confinement, the landlord is limited as to the amount of rent that he can charge the manager for the unit.

Typically, an owner will offer the manager a reduction in his or her monthly rent in exchange for managerial services. While a rent reduction is proper, the maximum rent which may be charged for the manager's unit still remains as the lesser of 564.81 or \$835.49 a month, and two-thirds the ordinary rental value of the unit, if the manager(s)

*(continued on page 25)*

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must live on site.

There is one recognized exception to the "Maximum Rent" limitation for a 16 or more unit building. I call it the "Check Exchange" exception.

**Check Exchange Exception:** Under the Labor Code an owner may charge up to two-thirds of the ordinary rental value of the unit without regard to the 564.81 and \$835.49 limitations, provided that separate checks for the minimum wage payment and the rent are exchanged between the owner and the manager.

In order to take advantage of this exception, the owner

must pay the manager the full minimum wage (\$10.00 per hour for all hours worked) by one check and the manager must pay the owner rent in an amount not exceeding two-thirds the ordinary rental value by a separate check.

Under this arrangement, the employer is not permitted to offset the minimum wage he owes by the rent due from the manager. The theory is that payments for labor are absolutely required regardless of whether the manager pays the agreed rent.

**UNDER 16 UNITS:** If the apartment building has under 16 units and the manager's employment agreement is

properly prepared so that the manager is not required to live on the premises as a condition of his employment, then the 564.81 and \$835.49 maximum rent limitations discussed previously are not applicable. In such an event, the employer may charge the manager the full amount (or any other lesser amount) for the unit, provided that the employer separately pays to the manager the full minimum wage which the manager earns based on the number of hours worked.

For example, if the value of the unit is \$1,800 and the manager works 50 hours a month, the owner may charge the full

(continued on page 26)

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\$1,800 as rent provided that he also pays the manager \$500 for services rendered during the month.

However, if the manager is required to live in the “under 16 unit” building as a condition of employment, then the 564.81 and \$835.49 wage and rent limitations discussed previously do apply just as though the building contained 16 or more units.

### Raising a Manager’s Rent in a Rent Controlled Building

There are a multitude of rules and limitations concerning rental increases of apartment managers residing in

rent controlled units. Owners having rent controlled buildings in Los Angeles and who wish information on that topic may review the City’s “Resident Managers as Tenants” publication. That promulgation may be found at the following website: <http://hcidla.lacity.org/resident-managers-tenants>. The publication was last revised in May 2014, but remains applicable as of the present.

AOA members who are attorneys will find a further discussion of raising a manager’s rent in *Von Nothdurft v. Steck*. AOA members who are not lawyers should confer with legal counsel about the

*Von Nothdurft* case.

### Penalties for Not Complying with Wage Laws

The Labor Code provides that an employer (including an apartment owner and management company) may be liable for liquidated damages to the resident manager in an amount equal to the unpaid minimum wages if the employer was not acting in good faith or did not have reasonable grounds for believing that he/she was not in violation of the minimum wage law. **Thus, the employer will owe the manager double the unpaid wages.** (Labor Code Section 1194.2.)

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### Cell Phone Usage

Owners and management companies who require the resident manager to use his phone in the performance of his duties are required to reimburse the manager a "reasonable percentage" of the manager's personal cell phone bill. For a full discussion of the cell phone reimbursement law and what may constitute a "reasonable" percentage for reimbursement, please see my column in the October 2014 is-

sue of AOA Magazine.

### Sick Leave

California has a new sick leave law. It applies to every employee in the State of California that works more than 30 hours per year (repeat, 30 hours per year, not 30 hours per month). That calculates to about 8-2/3 paid sick days per year for a full time employee resident manager.

However, the amount of paid sick leave may be reduced to as little as 3 days or 24 hours per year, but only if the manager signs a resident manager agreement containing the proper legalese for that reduction. That verbiage is quite

technical and should be drafted by seasoned counsel.

### RECOMMENDATIONS

California's labor laws are exacting. The failure of owners or management companies to comply will easily expose them to \$100,000 to \$200,000 as back compensation to their managers, including substantial civil penalties, plus potential criminal sanctions. In order to stay within the bounds of the various laws, I recommend the following:

**1. Sign an Employment Agreement:** It is absolutely essential that every owner and management company

*(continued on page 28)*



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who employs a resident manager enter into a written employment contract which is voluntarily signed by both the employer in employee. The specific provisions to include in the contract are technical, but the general requirements concerning the wage and hour laws are contained in this article. Remember, resident managers are employees, not independent contractors.

2. **Review Your Existing Agreement:** If you already have an employment agreement, review it for consistency with the wage and hour laws for 2016 as I have discussed them.

Also, be certain they cover cell phone usage and the requirement for paid sick leave, including the reduction to just 3 days per year. Most existing agreements will need to be modified.

3. **Keep Time Sheets:** Keep time records signed by the manager attesting to the days and hours he or she works.

4. **Management Certification:** Require the manager to calculate all hours that the manager works during any given month. Then require the manager to submit a written certification to the owner at the beginning of each following month

setting forth the total number of hours that the manager worked the preceding month. That is the key to deterring a disgruntled manager from later claiming that he/she worked more time than they actually did. The law requires the employer to maintain daily time records for his manager. It is important to do so. But it is also important (from the standpoint of having me or any other attorney defend an owner or management company in court or at a Labor Commissioner Hearing) to have the manager certify the total number of hours he/she worked during the

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entire month.

**5. Post Manager's Name and Address:** Post the name and the address of the manager in charge of the apartment building. Also post the hours and days that the manager will be available for assistance if the manager has a fixed work schedule.

**6. Obtain a Copy of Minimum Wage Order No. 5 and MW-2014:** The current wage and hour regulations for apartment managers can be obtained by calling the Department of Industrial Relations at 415-703-4810. For a copy of the complete wage and hour publications affecting resident managers, ask for: "Public Housekeeping Order No. 5" (also known as IWC Order 5-2001) as well as "MW-2014." MW-2014 is a short version of Order No. 5, but omits some of the longer version's important provisions. The long version may be found online at [www.dir.ca.gov/iwc](http://www.dir.ca.gov/iwc). Once there, click on "View or download wage orders."

### Concluding Remarks

The key to complying with the wage and hour laws when employing a manager is that the owner or management company obtains a voluntarily

(continued on page 30)

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signed, properly drafted written employment agreement and monthly certifications setting forth the number of hours that the manager worked. By doing so, the employer can avoid thousands of dollars of potential liability to the manager under the wage regulations. Better still, the contract and certifications will deter litigation. The manager's attorney is not likely to sue if he does not expect to win the case in any substantial way.

A handy "Cut Out Summary" of resident manager wage, hour and rent laws immediately follows this article. Have a healthy and prosperous New Year! **ADA**

*Dale Alberstone is a prominent litigation and transactional real estate attorney who has specialized in real property law for the past 39 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.*

*Mr. Alberstone has been awarded an AV rating from Martindale-Hubbell. An AV rating reflects an attorney who has reached the heights*

*of professional excellence and is recognized for the highest levels of skill and integrity.*

*The foregoing article was authored in December 2015 and effective as of January 1, 2016. It is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.*

*Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1900 Avenue of the Stars, Suite 650, Los Angeles, California 90067. Phone: (310) 277-7300.*

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## **Apartment Managers: Wage, Hour and Rent Laws for 2016**

### **1. General Rules:**

- A. Minimum wage compensation for a manager is \$10.00/hour for each hour worked starting January 1, 2016.
- B. Overtime: Overtime of 1½ times hourly rate (\$15.00) must be paid if more than 8 hours per day, 40 hours per week, or 6 consecutive days.
- C. If the Manager is not required to live at the property of an under 16 unit building, but the Manager chooses to live there, then any rent may be charged.
- D. If the Manager is required to live at the property, regardless of the number of units, the rent paid by the Manager may not exceed the monthly sum of \$564.81 for a single manager, or \$835.49 for a couple.
- E. If no rent is charged, the Manager's wages may be offset by up to 2/3 the ordinary rental value, but no more than \$564.81 (one Manager) or \$835.49 (couple) per month.

### **2. Qualifications to General Rules:**

- A. **Under 16 Units:** If less than 16 units and the Manager is not required to live at the property, then Manager can be charged any rent, even if greater than \$564.81 or \$835.49. But \$10/hr. minimum wage must be paid to Manager without offset if full rent is charged. Dollar-for-dollar wage reduction is allowed in payment of minimum wage up to \$564.81 or \$835.49 (but not exceeding 2/3 the unit's value) if the rent is only partially reduced.

#### **B. 16 Units or More:**

**Exception No. 1: "Offset of Wages":** Manager's wages may be reduced by the lesser of (1) 2/3 the unit's rental value, or (2) \$564.81 per month (one Manager) or \$835.49 per month (couple) if no rent is paid. Dollar-for-dollar wages reduction if only a partial rent reduction. Manager's wages may not be offset by more than \$564.81 or \$835.49 even though the apartment might be worth significantly more.

**Exception No. 2: "Check Exchange":** Manager may pay up to 2/3 the value of the unit as rent (without regard to \$564.81 and \$835.49 limitations) provided that separate checks are exchanged for the Manager's payment of rent and Owner's payment of wages. Thus, the Owner must pay manager the full minimum wage (\$10.00 for all hours worked) and the Manager must pay Owner an amount not exceeding 2/3 the rental value by separate checks.

- C. **Cities With Higher Minimum Wages:** If the apartment complex is located in a city with a local minimum wage higher than the statewide minimum wage, then the employing Owner must compensate the Manager based on the higher wages. Example: Los Angeles: Less than 26 employees: \$10.50 starting July 2017; \$12 July 2018, etc.; 26+ employees: increases start July 2016.
  - D. **Managers are Employees:** Resident Managers are employees, not independent contractors of the Owner. That is true even if the Resident Manager Agreement specifies that the Manager as an independent contractor. The agreement cannot override the law.
3. **Penalties for Non Compliance:** Liquidated damages to the Manager equal to the unpaid minimum wage for the past 3 years, plus Manager's attorney fees, among others! Total exposure of \$100,000 to \$200,000 or more.
4. **Sick Leave:** Must provide a minimum of 3 days or 24 hours paid sick leave per year, but the law requires more days if the written agreement is not prepared properly.
5. **Cell Phones:** Must reimburse Manager reasonable amount for business use if cell phone is required. No reimbursement of cell phone is necessary if not required.
6. **Recommendations:**
- A. Sign a Contract: No offsets to the minimum wage are allowed unless the Manager voluntarily signs a written contract with Owner providing for such offsets!
  - B. Update all Contracts: Review and update all contracts to be consistent with all 2016 laws.
  - C. Management Certification: Require Manager to record all hours worked, initial and deliver such report to Owner.
  - D. Record Keeping: Keep accurate records of all matters concerning hiring, hours worked and firing of Managers, as well as the Manager's monthly certification of hours worked.
  - E. Posting: Post manager's name and address in conspicuous place at the building.

NOTE: As used herein, "Owner" means the Manager's employer and includes a management company employer. For a fuller discussion of these laws and certain exceptions, see the January 2016 issue of AOA Magazine or contact Mr. Alberstone.